No. 96-494 Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ALLEN E. ERTEL,

Petitioner

v.

PATRIOT-NEWS AND WILLIAM C. COSTOPOULOS,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF RESPONDENT WILLIAM C. COSTOPOULOS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the unanimous decision of the Supreme Court of Pennsylvania that petitioner's evidence did not create a triable issue of fact on the question whether respondent Costopoulos had "procured" publication of an allegedly defamatory newspaper article in *The Patriot-News* presents a substantial federal question?

2. Whether the unanimous decision of the Supreme Court of Pennsylvania holding that petitioner had failed to meet his burden of coming forward with evidence that the publication challenged as defamatory was false under the federal constitutional rule of *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986), and under Pennsylvania's summary judgment procedure, is contrary in any way to *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)?

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BRIEF OF RESPONDENT WILLIAM C. COSTOPOULOS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent William C. Costopoulos respectfully requests that the Court deny petitioner's request for a Writ of Certiorari to the Supreme Court of Pennsylvania.

OPINION BELOW

The unanimous opinion of the Supreme Court of Pennsylvania is reported under the caption *Ertel v. The Patriot-News Co.*, 674 A.2d 1038, 1996 Pa. LEXIS 721. The unreported opinions of the Superior Court of Pennsylvania and the Common Pleas Court of Philadelphia County are included in the Appendix to the Petition at 16a and 1a, respectively.

JURISDICTION

Petitioner makes no reference to the jurisdiction of this Court. Certiorari jurisdiction to review final judgments entered by the highest courts of states lies under 28 U.S.C. §1257(a), where, *inter alia*, rights under the United States Constitution are claimed. Although petitioner claims that the decision of the Supreme Court of Pennsylvania violates the Fourteenth Amendment, the federal constitutional claims are insubstantial and this Court accordingly lacks jurisdiction.

In addition, the Supreme Court of Pennsylvania's ruling that petitioner's evidence was insufficient as a matter of law to sustain his claim that respondent Costopoulos had "procured" the allegedly defamatory publication under Pennsylvania's common law, 674 A.2d at 1043, constitutes an independent and adequate state ground for the judgment in Costopoulos' favor. As such, this Court lacks jurisdiction to review other issues raised by petitioner, assuming arguendo that those issues raise substantial federal questions.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner invokes Section 1 of the Fourteenth Amendment to the United States Constitution. The text is set forth in the Petition, at 2.

STATEMENT OF THE CASE

The one and only claim pleaded in this action is defamation, based on the statutory and common law of the Commonwealth of Pennsylvania. The gist of the defamation claim is that an article published in the June 30, 1985 edition of the *Harrisburg Sunday Patriot-News* libelled petitioner for his role as the elected District Attorney of Lycoming County, Pennsylvania[1] in the conduct of a highly publicized murder investigation and trial in 1974.[2] The article quoted the view, expressed

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1. Petitioner Ertel is a prominent figure in Pennsylvania politics. After his term as District Attorney of Lycoming County, Ertel served as a United States Congressman. He also ran unsuccessfully for Governor and for Attorney General. In 1988 Ertel won a primary election for a seat on the Pennsylvania Supreme Court. In the interim between the primary and the general elections, the Pennsylvania Supreme Court directed the Secretary of the Commonwealth to remove Ertel's name from the ballot because the election was scheduled for an even-numbered, general election year in violation of the Pennsylvania Constitution. *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184 (1988).

2. Twenty year old Kim Lee Hubbard was convicted in 1974 of murdering 12 year old Jennifer Hill. The prosecution's theory of the case was that Hubbard abducted his younger sister's friend, strangled her, and disposed of her body in a cornfield, all on October 19, 1973.

The prosecution's case was based primarily on circumstantial physical evidence that was the source of considerable dispute at trial, on appeal, and in post-conviction proceedings. Among the disputed physical evidence issues was the condition of the victim's body (found in a relatively fresh condition after having been exposed to the elements for nine days according to the prosecution's theory) and tire casts (of a tire that was installed on Hubbard's car the day after the body was discovered and showing an imprint of letters on the sidewall which is improbable if taken from tracks left in the mud by a moving tire). There were additional questions raised concerning boot casts allegedly taken from the cornfield, the victim's clothing and the location of the body in the cornfield.

Hubbard was convicted of second degree murder and sentenced to 10 to 20 years in prison. The conviction was affirmed ultimately on appeal, and post-conviction proceedings in federal court were unsuccessful. Reported decisions include: *Commonwealth v. Hubbard*, 472 Pa. 259, 285, 372 A.2d 687, 699 (1977) (rejecting all but one of the claims of trial error; finding that Ertel personally had engaged in "prejudicial prosecutorial misconduct during his summation" and remanding for an evidentiary hearing concerning trial counsel's failure to object); *Commonwealth v. Hubbard*, 485 Pa. 353, 357, 402 A.2d 999, 1001 (1979) (affirming conviction and holding that "trial

by respondent William C. Costopoulos in a confidential legal opinion letter delivered to his clients, that there was "significant merit" to the Hubbard family's belief that there was "a strong pattern of prosecutorial manipulation and/or tampering of evidence." *Ertel v. The Patriot-News Co.*, 674 A.2d 1038, 1040, 1996 Pa. LEXIS 721. The Costopoulos Report is attached to this Brief as a Supplemental Appendix.

The Common Pleas Court of Philadelphia County granted summary judgment in favor of all defendants on the ground that plaintiff, a public figure, could not meet the actual malice standard set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See* Petition, at 6a. In an unpublished, two-to-one decision, the Superior Court of Pennsylvania reversed and remanded for trial. Petition, at 1b. The Supreme Court of Pennsylvania reversed and reinstated summary judgment for all defendants on the grounds that:

> (1) petitioner had failed to "offer evidence that any of the material at issue in the June 30th [*Patriot-News*] article was false", 674 A.2d at 1042, 1996 Pa. LEXIS at 12; and
>
> (2) the evidence was "insufficient as a matter of law to show that [respondent William C.] Costopoulos procured the publication of the June 30th article." 674 A.2d at 1043, 1996 Pa. LEXIS at 14.

The Petition for Writ of Certiorari presents no substantial federal questions, much less a federal question that warrants the exercise of this Court's discretionary certiorari jurisdiction.

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counsel's failure to object . . . was born of a reasonable, calculated, and apparently successful trial strategy"). *See also Barto v. Felix*, 250 Pa. Super. 262, 378 A.2d 927 (1977) (holding that public defender representing Hubbard on direct appeal of criminal conviction was not entitled to immunity from defamation liability for statements made to press on courthouse steps concerning misconduct by investigating state police officers in connection with the same circumstantial physical evidence).

ARGUMENT

1. The Pennsylvania Supreme Court's Adjudication That There Was Insufficient Evidence to Establish That Attorney Costopoulos Procured the Allegedly Defamatory Publication Does Not Present a Substantial Federal Question.

Like most states, Pennsylvania law requires a defamation plaintiff to prove that a defendant actually published the defamatory manner. 42 Pa. C.S.A. §8343(a)(2); *Gaetano v. Sharon Herald Co.,* 426 Pa. 179, 182, 231 A.2d 753, 755 (1967). Pennsylvania law recognizes a narrow exception to the publication requirement for those who "procure" the publication of defamatory material by others. *Ertel v. The Patriot-News Co.,* 674 A.2d at 1043, 1996 Pa. LEXIS at 15; *Henry v. Pittsburgh & L.E.R. Co.,* 139 Pa. 289, 298, 21 A. 157 (1891). *See also Restatement (Second) of Torts* §577, comment f. Liability for procuring a libellous publication requires proof that the defendant "directed or participated in the publication of the defamatory publication by another." 674 A.2d at 1043, 1996 Pa. LEXIS at 14. According to the Pennsylvania Supreme Court in *Ertel,* petitioner was required to show "at the very least, evidence of some affirmative action on the part of [Costopoulos]." 674 A.2d at 1043, 1996 Pa. LEXIS at 14.

The undisputed facts showed that Costopoulos delivered his confidential opinion letter to his client and to no one else. It was the client who transmitted the Costopoulos opinion letter to the newspaper. 674 A.2d at 1040, 1996 Pa. LEXIS at 2. Accordingly, there was no basis for claiming that attorney Costopoulos himself had published the allegedly libellous statements and petitioner did not contend otherwise.[3]

On the procuring issue, the only evidence of Costopoulos' involvement in the publication was a telephone call from respondent Dick Sarge, the newspaper reporter, to Costopou-

3. The Petitioner erroneously states at page 12 of the Petition that "[t]he *article* in the case at bar was prepared for Joseph Hubbard for a fee of $2,500.00." (Emphasis added). Costopoulos did not prepare the *Patriot-News* article, respondent Dick Sarge did. 674 A.2d at 1040, 1996 Pa. LEXIS at 2. Costopoulos prepared the Report for his client, which Sarge then quoted in his newspaper article.

los. Sarge, who already had the Costopoulos opinion letter in hand, inquired of Costopoulos whether the newspaper could publish the report. Costopoulos replied: "I don't care what you do with it." 674 A.2d at 1043, 1996 Pa. LEXIS at 14. On those facts, the Pennsylvania Supreme Court directed that summary judgment be entered for attorney Costopoulos, holding that petitioner had adduced insufficient evidence to make out a triable claim on the procuring issue:

> "Costopoulos is entitled to judgment as a matter of law. Taking Sarge's statement in the light most favorable to Ertel as the non-moving party, this evidence at best shows that Costopoulos did not act to prevent Sarge from writing his article, and the *Patriot-News* from publishing it. This evidence is insufficient as a matter of law to show that Costopoulos procured the publication of the June 30th article. Costopoulos did not affirmatively act to direct or participate in the publication of the June 30th article; rather, he merely failed to hinder its publication. Thus, the entry of summary judgment in favor of Costopoulos by the trial court was correct . . . ." 674 A.2d at 1043-44, 1996 Pa. LEXIS at 16.

In essence, the Pennsylvania Supreme Court restated and refined Pennsylvania's common law rule on the liability of persons for procuring the publication of defamatory matters by others. This is an arcane area of Pennsylvania law that the state Supreme Court last addressed in 1891. See *Henry v. Pittsburgh & L.E.R. Co.*, 139 Pa. 289, 21 A. 157 (1891).

The requirement that petitioner prove that respondent Costopoulos "actively participated" in the publication does not implicate the federal constitution. Neither the Fourteenth Amendment nor any other provision of the United States Constitution requires states to facilitate defamation recoveries by public officials on proof of a lesser degree of involvement in the publication than "active participation."[4]

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4. Nor is there any basis for claiming that petitioner's procedural due process rights were infringed. In granting summary judgment for Costopoulos on the procuring issue, the Pennsylvania Supreme Court applied Rule 1035(b), Pa.R.C.P., which is similar in all material respects to Rule 56, F.R.Civ.P. After five years of discovery, the defendants moved for summary

2. Petitioner's Claim That *Milkovich v. Lorain Journal Co.* Was Improperly Overlooked in the Course of the Pennsylvania Supreme Court's Application of the Federal Constitutional Rule Announced in *Philadelphia Newspapers v. Hepps* Is Groundless[5]

In deciding that petitioner's failure to adduce *any* record evidence that *The Patriot-News* article contained false statements was fatal to his case, the Pennsylvania Supreme Court invoked, and faithfully applied, the federal constitutional rule of *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986). The *Hepps* rule requires that states impose on public figure plaintiffs the burden of proving falsity in defamation cases. 475 U.S. at 767. The Court below properly applied the *Hepps* burden of proof standard in the context of a summary judgment motion that tested the adequacy of petitioner's falsity evidence. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), is not to the contrary.

Even though Ertel could point to no record evidence that established that any statement made about him in the *Patriot-News* article was false, the Superior Court of Pennsylvania (an

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NOTES *(Continued)*

judgment based upon the record evidence, including admissions in pleadings, deposition testimony and answers to interrogatories. Plaintiff was given the opportunity to respond, and in fact did respond, and filed a personal affidavit in his ultimately unsuccessful effort to refute various facts relied on by the respondents in their motions for summary judgment. The defendants' motions for summary judgment were handled in the regular course of motion practice in the Common Pleas Court of Philadelphia. Similarly, the appeals to the Superior and Supreme Courts were handled routinely and in accordance with the Pennsylvania Rules of Appellate Procedure. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993) (states must provide notice and an opportunity to be heard before depriving citizen of property). Petitioner accordingly received all the process that was due him.

5. The Supreme Court of Pennsylvania's ruling on the procuring issue is dispositive of the entire case against respondent Costopoulos. Accordingly, there exists an independent and adequate state ground for the judgment in Costopoulos' favor, and the Court has no jurisdiction to consider any remaining issues involving him. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

intermediate state appellate court) held that the falsity issue was a triable claim because "Ertel's complaint satisfies his burden at this stage of the proceedings", Petition, at 60b, and because the defendants "[had] not come forward with any evidence that the allegations of evidence tampering are true." Petition, at 64b.[6]

The Supreme Court of Pennsylvania held that, because petitioner bears the burden of proving falsity under *Hepps*, he could not avoid summary judgment by resting on the empty, conclusory allegations of falsity pleaded in his complaint:

> "[I]t is the burden of a public figure plaintiff, such as Ertel, to show that the statements at issue are false. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 775 (1986). The Court [in *Hepps*] reasoned that although 'requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so,' this result was justifiable since placing the burden on media defendants to prove truth would create fear of liability and deter free speech. *Id.* at 777-778.
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> . . . .
>
> The Superior Court held that the newspaper, as the moving party, was obliged to submit evidence that the claimed defamatory material was true, even though the newspaper had no such obligation at trial. *See* Super. Ct. Slip. Op. at 34. [Petition, at 34b] The Superior Court held that in the absence of the newspaper introducing any such evidence, Ertel had no obligation to introduce any evidence concerning its falsity. Employing this standard, the Superior Court concluded that since the newspaper failed to produce evidence to show that the material at issue

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6. The Superior Court also declined to attach any significance to Ertel's admission in answers to interrogatories that he could identify no false statements in the article. Asked by Costopoulos to identify each statement by him "which you contend is defamatory", petitioner responded: "I do not attribute any one statement, but the entire article, its tone, and conclusions are attributable to defendant Costopoulos as well as other defendants." Petition, at 22b. Describing the interrogatory answer as "evasive", the Superior Court nevertheless refused to construe it as an admission that petitioner had no evidence that any statement in the article was false. Petition, at 68b, 70b.

was true, then Ertel had no obligation to offer even a scintilla of evidence of falsity to withstand the motion for summary judgment.

The Superior Court's decision is inconsistent with the language and purpose of our summary judgment rule. Rule 1035 does not require that the moving party introduce evidence on an issue on which it does not bear the burden of proof in order to have its motion granted. Additionally, the rule explicitly states that a non-moving party may not avoid summary judgment by 'resting upon the mere allegations or denials of his pleading . . . .' *See* Pa.R.C.P. No. 1035(d). Allowing non-moving parties to avoid summary judgment where they have no evidence to support an issue in which they bear the burden of proof runs contrary to the spirit of Rule 1035. . . . Forcing parties to go to trial on a meritless claim under the guise of effectuating the summary judgment rule is a perversion of that rule." 674 A.2d at 1042, 1996 Pa. LEXIS, at 10. (footnote omitted).

The essence of the decision of the court below is that, both as a matter of federal constitutional law and of Pennsylvania summary judgment procedure, once the sufficiency of the evidence supporting a claim of falsity is properly challenged on a summary judgment motion, a public figure plaintiff has the burden of coming forward with some cognizable record evidence that tends to show that the challenged statements are false. Petitioner failed to do so, and under *Hepps* and Pennsylvania's summary judgment and procedure, the Pennsylvania Supreme Court properly felt obliged to summary judgment enter against him on the falsity issue.

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), supports this conclusion. In explaining why the First Amendment policy of encouraging free and robust debate about public officials and matters of public concern does not require a per se federal constitutional rule immunizing opinions from liability,[7]

7. The core decision in *Milkovich* is that there exists no "additional separate constitutional privilege for 'opinion'". 497 U.S. at 21.

the *Milkovich* Court emphasized the protection already afforded free speech by the *Hepps* burden of proof requirement:

> "*Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved. . . .
>
> *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a *provably false factual connotation* will receive full constitutional protection." 497 U.S. at 19 (emphasis added, footnotes omitted).

Petitioner apparently takes encouragement from the *Milkovich* Court's reference elsewhere to the role that state defamation law plays in protecting public figures' reputations from "false and defamatory facts", "false implications" and "false connotations". 497 U.S. at 20. *See* Petition, at 11-12. Thus, the argument seems to go, this Court should grant review because the Pennsylvania Supreme Court's ruling that petitioner failed to meet his burden of proof on the falsity issue disregarded the false implications and connotations allegedly contained in the *Patriot-News* article, contrary to *Milkovich*.

That the *Milkovich* Court discerned a legitimate state interest in creating a defamation tort remedy to protect reputations from false statements and "implications" does not mean that the Court was formulating a rule of constitutional magnitude that *requires* states to provide a liberal defamation remedy for such publications. This Court's reference to tort recovery for false statements and "implications" was made in the context of pointing out the countervailing state interest in protecting reputation that the Court balanced against the federal constitutional interest in protecting free speech. As the *Milkovich* Court itself emphasized, *Hepps* strikes the constitutional balance in favor of free speech by imposing on public

figure plaintiffs the burden of proving falsity. The Court below properly applied the *Hepps* rule, and nothing in *Milkovich* trumps *Hepps*.[8]

CONCLUSION

The state court adjudication *against* a public figure plaintiff in this defamation case does not raise any questions that require the attention of the Supreme Court of the United States. The Supreme Court of Pennsylvania held that petitioner was not entitled to a trial of the procuring issue because the undisputed facts showed that respondent Costopoulos had not procured the allegedly defamatory publication as a matter of state law. The court below ruled against petitioner on the falsity issue because he failed to identify, and was unable to identify, any false statements in *The Patriot-News* article. These are failures of proof in a state tort case that involve no substantial federal questions.

For these reasons, respondent William C. Costopoulos respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

WHITE AND WILLIAMS
Attorneys for Respondent,
William C. Costopoulos

By: _____
David E. Sandel, Jr.
Michael N. Onufrak

Dated: October 28, 1996

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8. Petitioner's suggestion that this Court reach out and rule on questions not encompassed by the Pennsylvania Supreme Court's opinion is absurd. *See* Petition, at i & 12-14.

Supplemental Appendix

TO: MR. and MRS. JOSEPH HUBBARD

FROM: William C. Costopoulos, Esquire

DATE: June 5, 1985

RE: INDEPENDENT CASE ANALYSIS OF COMMONWEALTH OF PENNSYLVANIA vs. KIM LEE HUBBARD; Criminal No. 73-11, 218; Lycoming County, Pennsylvania

I. INTRODUCTION

This report is an independent case analysis conducted by the law firm of KOLLAS, COSTOPOULOS & FOSTER, 831 Market Street, P.O. Box 222, Lemoyne, Pennsylvania 17043. The subject of this report is Criminal No. 73-11, 218, Lycoming County, *Commonwealth of Pennsylvania vs. Kim Lee Hubbard.* The purpose of this report is to analyze all aspects of the evidence in the above case and, specifically, to answer the question: whether, by virtue of the evidence presented, that same evidence is sufficient to prove Kim Lee Hubbard innocent of the murder of Jennifer Hill. Further, we recommend any additional course of action necessary to effectuate the most beneficial disposition of the case. This report is based on evidence received by this office from Joseph Hubbard as well as readings of the main trial transcripts, appellate briefs and court opinions, interviews with all three appellate counsels and others, and a field trip to South Williamsport.

After careful review, we submit the following:

II. PROCEDURAL HISTORY

Kim Lee Hubbard was convicted of murder in the second degree of Jennifer Hill on March 1, 1974, following a trial by jury with Judge Charles F. Greevy of Lycoming County Court of Common Pleas, presiding. Patrick H. Fierro, Esquire of Williamsport, now deceased, was privately retained defense counsel. Kim was sentenced to serve 10 to 20 years at the State Correctional Institution in Dallas. Upon conviction, John (Jack) A. Felix, Esquire of Williamsport, became post-verdict counsel. The defendant's post-trial motions were denied. Peter T. Campana, Esquire of Williamsport, became appellate counsel for the defendant. On direct appeal to the Supreme Court of Pennsylvania, No. 386, January Term 1975, 372 A.2d 687, 472 Pa. 259, the Judgement of Sentence was vacated and the case remanded to trial court for proceedings consistent with opinion. Judge Greevy, following an evidentiary hearing over ineffectiveness of counsel, reinstated the Judgement of Sentence on August 18, 1977 (14 Lycoming 49). The defendant filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Pennsylvania, Civil Action No. 79-1056. The Writ was denied on November 26, 1979 by Nealon, J. On appeal to the United States Court of Appeals for the Third Circuit on December 11, 1979, No. 80-1369, the judgement of the District Court was affirmed on July 7, 1981. Finally, by Richard S. Watt, Esquire of Norristown, a petition under the Post-Conviction Hearing Act was filed in Lycoming County Court on January 7, 1982. Upon motion by the Lycoming County District Attorney, the petition was dismissed, without hearing, by Judge Robert J. Wollett. Kim Lee Hubbard, after a ten-year period of incarceration, is presently on parole.

III. FACTS OF THE CASE

Jennifer Hill, 12 years old, of 353 Hastings Street; South Williamsport, Pennsylvania, spent the night of October 18-19, 1973 with her friend, Ruth Hubbard, sister of Kim, at the Hubbard home, 1030 West Central Avenue, South Williamsport, Pennsylvania. The morning of Friday, October 19, a school vacation day, the two girls went outside to play. Jennifer was wearing a long-sleeve jersey, dark blue with gold trim and the number 33 in white letters, dark jeans with red hearts on the knees and red cuffs, and old black sneakers. At about 12 noon, Jennifer had a hoagie, milk shake and french fries. Later, during a grape battle, she ate several green grapes. Both girls returned to the Hubbard home between 3 and 3:30 p.m. At 3:40 p.m., Mrs. Norma Hill, mother of Jennifer, called the Hubbard home, spoke to her daughter and told her to come home. Jennifer began to cry. She wanted to go to a football game that night with the Hubbard's, but her parents refused to let her go, and she did not want to clean out her dresser drawers. At 3:45 p.m. Jennifer left the Hubbard home, alone and on foot, for the 10½ block walk to her own home. At 3:55 p.m. Joe Mendez testified he saw her one block from her home.

According to the prosecution, Mrs. Betty Nevel saw Jennifer in front of the Nevel home at 4:30 p.m. entering a light green car with a white helmet on the ledge. The car was driven by a man. Mrs. Nevel, a hypnotized eyewitness, did not actually identify Jennifer; her daughter, Beth, did.

According to the defense, Kim Hubbard left the Barr home at 3:58 p.m., alone in his car, and arrived at his home around 4 p.m. He walked to the Hum-Dinger restaurant and talked to Bob Fries for 15-20 minutes. Kim returned home and took a call from his girlfriend, Colleen Whitenight, at 4:30 to 4:35 p.m. Ruth Hubbard said that she and Kim argued over the use of the phone at 4:30 p.m. and then Colleen called. After the call, Kim continued buffing the floor in his sneakers. At 4:45 p.m. Jack Hill, father of Jennifer, called Kim and wanted to know where his daughter was. Kim asked his mother, Mrs. Dorisann Hubbard, who said she left at 3:45 p.m. Kim resumed buffing until 5 p.m., when his mother asked him to look for Jennifer.

The accusation against Kim, as presented by the trial judge to the jury, was that he picked up Jennifer with his own car in front of the Nevel home at 4:30 p.m., strangled her by hand, drove to the cornfield off Sylvan Dell Road in Armstrong Township, dumped her body 127½ feet off the road in that cornfield, drove back to his home and received a phone call from Jack Hill at 4:45 to 4:50 p.m. The crime and the accompanying sequence of events took place within 15-20 minutes according to the judge's charge to the jury.

Kim was convicted by three factors. First, the testimony of hypnotized eyewitness Mrs. Betty Nevel linked him to Jennifer's disappearance. Second, tire casts poured on the farm lane about 30 feet from Sylvan Dell Road tied him to the scene of body discovery; Cast No. 91 matched the left rear tire of Kim's car (marked as No. 87). And three, Boot Cast No. 51, made from under the victim's body, matched the defendant's left boot (marked as No. 97).

Kim's alibi was two-fold. First, Colleen Whitenight testified she called Kim at home from her father's store at 4:30 p.m. As she testified, Kenneth Whitenight, her father, shouted "Colleen, how can you sit up there and lie? For God's sake, you have lied enough already." He was ejected from the courtroom. A newspaper account added: "God forgive her, she doesn't know what she's doing!" Second, Mike/Phil Grimes, Kim's cousin and neighbor, testified that he saw Kim's car parked outside the Hubbard home the entire time between 4 and 5 p.m.

At about 3:55 p.m. on October 28, five minutes before the search was to be called off, Civil Air Patrol (CAP) Officer Duane Gleckner found the body of Jennifer, lying between rows of corn, which were parallel to Sylvan Dell Road, and three to four feet off the farm lane. Dr. Robert Catherman of Philadelphia, forensic pathologist, concluded that death occurred on October 19 between 4:30 to 6 or 8 p.m. by manual strangulation.

IV. SUBSTANTIVE EVALUATION OF THE CASE

This review will focus on five areas of disputed evidence: the condition of Jennifer Hill's body, the location of the body when found, tire casts, boot casts and clothing. In addition, we will briefly examine other issues in the case.

A. CONDITION OF THE BODY

Jennifer Hill was killed on October 19, 1973 and her body was found 9 days later in a cornfield on October 28. On October 31, at Noll Funeral Home in South Williamsport, a private, open-casket viewing of Jennifer's body was held. Dorisann Hubbard, mother of Kim, attended. This was 12 days after her death. The average ambient temperature during this period of October 19-28 was 49.95 degrees Fahrenheit by official National Weather Service records. Pathologist Catherman, in his autopsy report, concluded: "Based on the autopsy findings and a review of the circumstances surrounding the decedent's disappearance and the circumstances of the location and discovery of the decedent's body, *there is nothing inconsistent with the decedent's death occurring on or about 10/19/73.*" (emphasis added) We contend otherwise.

On January 23, 1980 at the Allegheny Co. (Pa.) Morgue, Forensic Pathologist Glen M. Larkin and Chief Autopsy Technician Floyd C. Coles examined pathological evidence related to Jennifer. They concluded, with absolute certainty, that her body was not in the cornfield for 9 days and had not even been dead for 9 days unless it had been refrigerated. There was very little decomposition; the stomach wall was not disintended; the stomach contents were identifiable with a great deal of detail; there was an almost complete lack of fly larvae and the brain was in good condition. Coles even states that "the condition of the body" is "completely inconsistent with a body being dead over 24 to 48 hours at the most." Steve McCune, a Noll employee who embalmed the body, reported that it was an "easy embalming," the blood was fresh, and "no way that body was dead that long." Mr. Noll, the funeral director, told Attorney Jack Felix that he was struck by the firmness of the body.

McCune further identified a dental tie (an embalming device) in the victim's mouth in body photo no. 8, which shows the body as found in the cornfield. And in one of the autopsy photos taken on October 29, ten days after death, rigor mortis of the right arm is depicted according to McCune. Rigor mortis occurs no longer than three days after death, not 10. Finally, Coroner Miller testified that the body was found lying on a cornstalk, though he contradicted himself by saying first the left shoulder was off the ground and later saying the right shoulder was uplifted. The autopsy report and photos show no marks on the back of the body, an almost certain result of a body lying on a cornstalk for 9 days.

The stomach contents were central in determining October 19 was the date of death. Dr. Catherman reported finding bread; french fries, a tomato, and a green grape with the skin partly peeled in the decedent's stomach, which is what she ate on October 19. According to Dorisann Hubbard, South Williamsport Mayor Frey cane to the Hubbard home on October 22 and asked what Jennifer had to eat on October 19. Police Chief Smith asked the same question on October 23 and also asked if she had a bowel movement that day. When Catherman was cross-examined on the date of death, he testified, "No, I was basing it (time/date of death) on the nature and type of stomach content that I observed in connection with the circumstances of the meal which she was last known to have eaten as you provided in the assumption of facts that I was given." As stated above, stomach contents would not be identifiable in a body lying in a field for 9 days let alone identifiable with such striking clarity.

Joe Hubbard and Charles King, a family friend, met with Dr. Catherman at the office of Philadelphia Medical Examiner after the trial. According to King, Catherman told them he received a phone call from District Attorney Ertel and Coroner Miller, who explained they had a body supposedly dead for 9 days but which looked "fresh." (Catherman, a boyhood friend of Miller and a native of Williamsport, is often called by Lycoming County to offer opinions favorable to the prosecution, according to Attorney Peter Campana.) When Joe Hubbard told Catherman they knew the body was refrigerated at

Williamsport Hospital after it was found on October 28, Catherman replied, "She was refrigerated long prior to the 28th of October. Why, where, when or by whom" he did not know.

Finally, it is important to note that Patrick Fierro, defense trial counsel, did not once raise the question of the condition of the victim's body at trial — a critical omission.

The fact that the condition of the body of Jennifer was found on October 28 and as publicly viewed on October 31 is wholly inconsistent with its being dead from October 19 and lying in a cornfield for nine days does not prove Kim Lee Hubbard's innocence. However, it conclusively demonstrates a fatal weakness in the prosecution's case: that Kim dumped the body in the cornfield on October 19 and that it was found by Duane Gleckner on October 28. For if the body was not in the field for nine days, then it was refrigerated. And if it was refrigerated, another person or persons is immediately implicated in the crime itself, and another person or persons dumped the body in the cornfield shortly before October 28 for it to be "discovered." In any case the body lay in the cornfield for only a short time prior to being found on October 28. The events of the murder of Jennifer Hill did not take place the way the prosecution asserted they took place because it is a medical and scientific impossibility for an unrefrigerated, 9-day old body lying in a cornfield in 50-degree, dry weather to appear "fresh" upon discovery.

B. LOCATION OF THE BODY

CAP Captain Duane Gleckner found the body of Jennifer Hill shortly before 4 p.m. on October 28 in a cornfield off Sylvan Dell Road in Armstrong Township. It was about 27 feet from Sylvan Dell Road (hereafter: road), lying inbetween rows of corn which are parallel to the road and perpendicular to the farm lane hereafter: lane), and 2 to 3 feet off the lane. He radioed Major Hunsinger, CAP officer in charge of the search, who confirmed the find. When Coroner Miller arrived at the scene; he made measurements while standing in the cornfield to the east of the body. Miller spoke aloud to

Trooper Housser who was standing on the road writing down the measurements. Miller's testimony confirms Gleckner's account of the body located about 30 feet from the road and lying in between corn rows parallel to the road. Miller referred to "original" photos Nos. 1 and 2 in his testimony, which depict the body lying in between corn rows with the feet closest to the lane.

Also at the trial, Trooper Barto testified he measured the body location at 127½ feet from the road and about 15 feet off the lane. District Attorney Ertel introduced aerial photos Nos. 36 and 37 of the cornfield, which show an indentation where the police cut down cornstalks around the body — it corresponds to the 127 feet location. Several people, including Gleckner, identified that area as where the body was found. However, only the first 8 rows run parallel to the road. All the others — including those at the 127½ feet location — run parallel to the farm lane and perpendicular to the road. And body photo Nos. 3 through 8 clearly show the body lying *across* rows of corn, contrary to the testimony of Gleckner and Miller; who were shown only photos Nos. 1 and 2 at trial. Two contradictory body locations were introduced at the trial by the prosecution: at 27-30 feet and at 127½ feet.

Three additional factors support this contradiction. First, Gleckner told Peggy Rachel in an affidavit filed by the latter in October 1980 that he is positive that there were two sets of body scene photos and that Ertel intentionally confused him with aerial photos Nos. 36 and 37. Second, Miller could not have orally relayed measurements to Houser, standing on the road, from the 127½ feet location — it simply is too far to be heard through standing corn rows. And finally — perhaps most interestingly of all — Max Young, the farmer of the cornfield, stated in a March, 1985 affidavit, that the corn was not standing after October 29.

Young arrived at the cornfield the morning of October 29, where police were still on the scene from the previous afternoon. He was given permission to harvest his corn except for a 30-foot square around the 127½ feet body location, and he did so commencing about 12 noon. Ertel introduced aerial photos Nos. 36 and 37, taken at an unspecified date after

October 28, to show the indentation created by the troopers when they cut down the cornstalks around the body and to have witnesses identify that location as the site where the body was found. Those photos were not taken October 28 or 29 because they show no police vehicles. They were not taken after 12 noon on October 29 because they show standing rows of corn. Aerial photos Nos. 36 and 37 had to be taken prior to October 28. Yet, they clearly show an indentation in the cornfield, which Ertel contended corresponded to the body location. In fact, that indentation has nothing whatsoever to do with troopers cutting down cornstalks because it existed before the body was found and the aerial photos themselves were taken before the body discovery on October 28. This casts further doubt on the 127½ feet location, not to mention the prosecution's case in general.

The existence of two body locations at trial does not prove the innocence of Kim Lee Hubbard. However, according to Attorney Dick Watt, appellate counsel, it is the most damaging piece of evidence against the prosecution scenario. Kim was never linked to the scene of the crime itself. At sidebar, Ertel admitted that "nobody knows where the scene of the crime is." Yet Judge Greevy, in his charge to the jury, said, "Obviously, the Defendant cannot be guilty unless he was at the scene of the crime. . ." Kim was only linked to the scene of the body find, and by two pieces of evidence: tire casts made on the farm lane about 100 feet toward Sylvan Dell Road and boot casts made at the 127½ feet location. Therefore, if the Gleckner/Miller location of 27-30 feet is correct, the cast evidence was fabricated because the defendant would not have gone beyond 30 feet on the farm lane, and therefore his tires and boots could not have made those impressions *in the cornfield.*

C. TIRE CASTS

Kim Lee Hubbard was convicted on the basis of plaster of paris casts made of tire impressions said to be left by his car on October 19 in mud on the farm lane about 30 feet from Sylvan Dell Road. Specifically, Cast No. 91 was linked to Tire

No. 87, the left rear tire and it showed six good treads. The tire casts made in the cornfield additionally tied Kim to the scene of the body's discovery. That the tire casts were actually poured on the farm lane is contestable by several evidentiary discrepancies. (Portions of this section were excerpted from Attorney Dick Watt's PCHA petition.)

First, Commonwealth Photo No. 10 shows a piece of mud said to be located in the lane about 100 feet toward Sylvan Dell Road from the location where the body of the victim was found. Cast No. 91 was taken from the mud depicted in Photo No. 10, according to the prosecution, and the mud print was made by the left rear tire of Kim's car, Tire No. 87. However, the mud shown in Photo No. 10 simply does not match Cast No. 91. Therefore, it is highly unlikely that Kim's left rear tire made the mud print shown in Photo No. 10.

Second, the left front tire of Kim's car had a flat on October 29. Mr. Faust of Poole's Sunoco put a new tire on the car the same day. His car was impounded on October 31. That new tire was marked as Commonwealth Exhibit No. 89 and alleged by the prosecution to have made the mud print depicted in Photo No. 9 and the Tire Cast No. 92 (right front). Keeping in mind that the tire casts were poured on October 28 and said to be impressions made by Kim's car on October 19, the date of the murder; the prosecution's official evidence then included a tire which was not even on the car until October 29 — ten days after the murder. The only logical conclusion to be drawn is that Tire Cast No. 93 was fabricated.

Third, Photo No. 9 shows one piece of mud on the lane containing two tire prints, adjoining, and said to be made by the right front and right rear tires of Kim's car. Photo No. 21, in turn, depicts two plaster of paris casts poured in that same piece of mud. Those tire casts were marked as exhibits Nos. 92 and 94. However, there is a major discrepancy between Photos Nos. 21 and 9, both of which purport to show tire prints. Photo No. 21 depicts two separate casts with vegetation between them; Photo No. 9 depicts one piece of mud containing two parallel tire prints and no vegetation. If Photo No. 21 is a photo of the tire prints shown in Photo No. 9, there should be no vegetation between the casts. In fact, Photo No. 21 does

not show plaster of paris casts of the tire prints shown in Photo No. 9 per the Commonwealth's contention.

Fourth, Tire Cast No. 94 was entered into evidence by the prosecution as having been made by the right rear tire of Kim's car in the farm lane. This tire cast clearly contains the imprint "ELD" from the trademark "Kelly-Springfield" on the side of the tire. According to several police experts; the tire of a moving vehicle cannot leave an impression of the tire's trademark. Moreover, the tire must be off its rim in order to make even a stationary impression of the trademark. Kim's right rear tire, alleged to be moving through the farm lane, could not have made the tire impression of Tire Cast No. 94, which contains the letters "ELD" of the tire trademark, because a moving vehicle cannot leave a trademark impression.

There is evidence to suggest that some or all of the tire casts were possibly fabricated at the South Williamsport Borough Hall, where Kim's car was impounded on October 31. Several photos of the car jacked up show a white, chalky substance on the garage floor as well as white tire tracks. Paul Stiner, in an affidavit before the trial, alleged that he saw plaster of paris prints at the Borough Hall the day after Kim's car was impounded. Alan Ertel, in a January 14, 1974 letter to Judge Greevy, insisted that Stiner was mistaken and had, in fact, seen a cleaning compound on the floor. Finally, a Joe Hubbard affidavit of April 25, 1980 refers to statements made by Captian Ross of the South Williamsport Police Department in front of himself, his wife, Charles Fitzgerald and Dwight Schmuck. Ross allegelly said that the State Police ran the new tire (Tire Cast No. 92) through a trough filled with plaster of paris on October 31, while the car was impounded at Borough Hall.

Furthermore, the tire evidence may have been tampered with prior to an evidentiary hearing before Judge Greevy during the summer of 1974. The four tires on Kim's car in October 1973, prior to October 29, were very bald. Mr. Faust stated they would not pass inspection. Indeed, Jack Felix and Kim's parents viewed the tires and other evidence at the State Police Barracks in Montoursville prior to the hearing. Felix, in an

affidavit of August 13, 1975 stated: "Tires which I recall as being marked Commonwealth's Exhibit 87 and 88 were two tires on rims with not very discernible treads visible and both appeared to show effects of wear to the 'outside' ". At the hearing, Ertel claimed he was not aware the tires were to be physically produced. The State Police brought them from Montoursville causing a one-hour delay. When exhibited, the tires were apparently not the same as those viewed earlier. According to Felix, "Tires which were brought into the Court Room bearing identification labels as Commonwealth's Exhibit 87 and 88 appeared to be recapped tires and there was some mud visible on the rims. One of these tires contained six fairly 'good treads' ". By his own account, Felix was shaken by the apparent tampering of evidence, had to sit down and made no challenge. The original four tires were very bald, with no discernible treads. Yet a photo provided Felix by Judge Greevy earlier showed six good treads. And Ertel at the hearing displayed the first tire produced by the State Police and, without being asked, proclaimed that it had six good treads.

In addition, Felix had in his office, by permission of Judge Greevy, Exhibit No. 110 — a poster with six photos, red lettering and red pin-striping going from photo to photo. When produced at the hearing, No. 110 had only four photos and no pin-striping according to Charles King. Felix stated: "Photo 110, which had been examined at length in my office, purported to be a photo of a cast showing certain visible tread grooves within it, and used red colored guidelines. But this 'same' photo when referred to in the subsequent Oral Argument showed different color guidelines."

The discrepancies surrounding the tire evidence do not prove the innocence of Kim Lee Hubbard. However, Kim was linked to the scene of the body discovery in large measure by the tire casts, and this nexus resulted in his conviction. Given the serious charges relative to the tire evidence, we are able to conclude that a reasonable doubt is raised as to whether Kim's car was ever in the cornfield's farm lane. And absent the tire evidence, a conviction most likely would not have been obtained by the prosecution.

D. BOOT CASTS

Kim Lee Hubbard was convicted on the basis of a plaster of paris cast of impressions said to be left by his boots on Octoter 19 in the mud under the victim's body at the 127½ feet location. Specifically, his Left Boot (marked as Commonwealth Exhibit No. 97) allegedly made both prints contained in Cast No. 51. Attorney Peter Campana regards this cast as the most damaging piece of evidence against Kim.

Commonwealth Photos Nos. 11 and 15 show heel prints in mud that the prosecution said were made by Kim's boots. These heel prints are 9 inches apart. Commonwealth Photo No. 20 depicts plaster of paris casts poured at the body find. At the trial prosecution argued that the lower cast in Photo No. 20 was Cast No. 51, which contained the heel prints shown in Photos Nos. 11 and 15. However, Cast No. 51 clearly shows that the two heel prints are almost touching rather than 9 inches apart. The only conclusion to be reached is that Cast No. 51 is not a cast of the heel prints shown in Photos Nos. 11 and 15, which were taken at the 127½ feet scene of the victim's body.

Further, Cast No. 51 was said to have been made from under the victim's body. At 4:30 to 4:45 p.m. on October 19, a heavy rain began to fall on the cornfield. The dirt in the cornfield quickly turned to mud. The body likewise became wet and covered with mud. And the autopsy photos and report indicate that the victim's entire backside, including the buttocks said to be directly over the two heel prints in Cast No. 51, was coated with (by then dried) mud.

Many, including Peter Campana, believe it was impossible to obtain a boot print from under a body whose back was covered with mud. Alan Ertel, in his summation (p.7), contended that the boot prints in fact were protected from the rain by the body. And this despite the pathologist's account that the body itself was coated with mud.

Cast No. 51 of Kim's left boot, said to be made from under the victim's body at the 127½ feet location, linked him to the scene of the body find and probably was the most damaging piece of evidence overall. The serious discrepancies sur-

rounding the boot cast evidence, like those of the tire casts, do not prove the innocence of Kim. But again, without it, the Commonwealth's already highly-circumstantial case would have been non-existent.

E. CLOTHING

There are numerous discrepancies relative to the victim's clothing, together with the condition and location of the body, suggesting that the body itself was tampered with.

Jennifer Hill wore a blue long-sleeve jersey (Exhibit No. 67) with the number 33 in gold on October 19. Body Photos Nos. 4, 5, and 6 clearly show a jersey matching that description on the victim when found in the cornfield on October 28. Prior to the evidentiary hearing in the summer of 1974, Jack Felix and Kim's parents examined the jersey at the State Police Barracks in Montoursville. According to Felix, "the blue jersey which was removed from a clear plastic bag smelled both musty and sour." Joe Hubbard added that dried mud and a vomit stain were on the jersey. At the evidentiary hearing, "the jersey which was removed and displayed to the Court appeared much more damp than it had at the State Police Barracks," by Felix's account. Joe Hubbard believed it had been washed. A photo of the jersey shows short — rather than long-sleeves. When Dr. Catherman was shown that photo and asked to compare it to his autopsy photos, he allegedly stated that they were different jerseys. Therefore, the jersey introduced into evidence was not the jersey on the body of the victim when found on October 28 as shown by photos nos. 4, 5, and 6. Coroner Miller testified that the victim's body was found with one arm in a coat. Dr. Catherman's report noted that no coat was on the body at the time of the autopsy. According to Dorisann Hubbard, Police Chief Smith visited daily during the 9-day disappearance, repeatedly making statements such as "Dorisann, please say that you made Kim take Jennie's coat after her," "Dorisann, you just don't remember because all of the upset, you did make Kim take Jennie home."

Jennifer wore dark blue jeans with red hearts on the knees and red cuffs on October 19. That afternoon she tore

the crotch in a kickball game. On October 28 her body was found with light blue jeans (additionally meaning that the victim also changed her pants during the 15-20 minute critical timeframe of 4:30 p.m. to 4:45 or 4:50 p.m.) At trial and the evidentiary hearing, the dark blue jeans showed machine-stitched white threads along the torn seam. Later, this stitching was partly removed. According to Felix, the dark blue jeans "had been partly sewn in the area of the crotch with white thread or string with a couple strands hanging loose." The Hubbard's had no sewing machine; the Hill's did. Jennifer's dark blue jeans were sewn at or after the time the Commonwealth contended that Kim killed Jennifer and Kim did not do the stitching.

Finally, and most important of all, Chief Autopsy Technician Floyd Coles asserted that: "although the victim was photographed with her bra off at the scene, the bra is back on the body in its appropriate place when the pathologist is examining. This implies strongly that there was tampering of the body between the time of discovery and the time the body was examined by the pathologist. Because of this, any statement relative to the condition of the clothing is suspect."

We are able to conclude that there is much evidence to suggest that the clothing and body was tampered with between the date of disappearance on October 19 and the date of body discovery on October 28, as well as between the latter date and the date of autopsy on October 29. That impact on the culpability of Kim is inconclusive.

F. OTHER ISSUES

1. The Hubbard's contend that Jennifer Hill arrived at her home about 4 p.m. on October 19, five minutes after she was seen by Joe Mendez less than one block from home; that she died at home as the result of domestic violence; and that at 5:35 p.m. Jack and Norma Hill, her parents, went out walking and were acting "odd". Jennifer did not want to go home that day; she had to clean her dresser drawers and her parents would not let her go to the football game. Jennifer had torn her good jeans, which she was not supposed to have worn that

day; the Hill's had a sewing machine upstairs. At 6 p.m. Norma reported Jennifer missing to Captain Ross and, in her description, stated that Jennifer was wearing dark blue jeans. The unanswerable question is: how did Norma know which pants Jennifer had worn if she had not seen her that day? If anything, Norma would have reported her wearing the light blue jeans which was Jennifer's change of clothing for the day. Finally, three factors point to Jennifer's death at home. First, while Dorisann Hubbard was at the Hill house keeping vigil on October 23 or 24, Garth Hill, seven years old and sister of the victim, allegedly said to her "Well, we know where she is, she's dead and dumped you know where." Norma glared at Garth. Second, after Jennifer's burial, Jack Hill drove Dorisann home and, in reference to sympathy donations, allegedly told her, "I'll tell you, Dorisann, this is the first time in my life that I've been out of debt." Third, at 3 a.m. on October 20, Mrs. Maggs, Jennifer's grandmother and in whose home the Hill family lived, called the Hubbard's crying hysterically and said she knew Jennifer had been killed.

2. On October 25 at 1:40 a.m., Mr. Pfirman, an administrator at Williamsport Hospital, and Bob Shoalts came to the Hubbard home in a drunken condition. For over two hours Pfirman accused Kim of murdering Jennifer — even though her body had not been found. Pfirman allegedly said, "We know what happened to Jennifer Hill. Are you going to tell us about it?"

3. The evening of October 19 Captian Ross came to the Hubbard home and told them about a man he found with a razor blade cut, bleeding in a sink, who said he knew the Hubbard's. Later, Kim, Dorisann Hubbard and Colleen Whitenight drove to the house where they thought he lived. They did not find him.

4. State Trooper Houser testified that he received four tire casts from Trooper Keppick on October 30 and transferred them along with the tires to the State Police Crime Laboratory in Harrisburg on November 1. However, Trooper Krebs of the Crime Lab testified: "I received two on the lst of November and two on the 5th of November." The point is this:

no tire casts were transported to Harrisburg until after Kim's car was impounded on October 31.

5. Mr. Bittle of the Bureau of Waste Water, Department of Environmental Resources, testified that he drove a 1973 International Scout on the farm lane in the cornfield the afternoon of October 19, and thus accounted for additional tire prints on the lane He wanted to make a sketch of the area relating to an oil-seepage investigation against ARCO. However, DER records obtained earlier this year show that Bittle, in fact, was in the cornfield on July 24/25, 1973 and that he filed a sketch initialed and dated July 25. There is no official record of Bittle in the cornfield on October 19 or of his having a need to be there.

6. Attorney Jack Felix, while handling Kim's appeal; was sued by "Trooper Barto, the affiant, and other troopers on the ground that Felix was interfering with their police duties. In a landmark case, *Barto et al. v. Felix*, (378 A.2d 927, 250 Pa.Super. 262, 1977); the Pennsylvania Supreme Court ruled that a public defender was not entitled to absolute immunity. After four years, the State FOP dropped the case.

V. CONCLUSION

After an exhaustive study of *Commonwealth of Pennsylvania vs. Kim Lee Hubbard*, which included an analysis of evidence compiled by Joseph Hubbard, father of Kim, readings of the main trial transcripts, appellate briefs and court opinions, interviews with all three appellate counsels and others, and a field trip to South Williamsport, we arrive at the following conclusion: the Hubbard's assertion of a strong pattern of prosecutorial manipulation and/or tampering of evidence in this case has highly significant merit, but the impact of that pattern on the culpability of Kim Lee Hubbard is inconclusive. We do not have clear and convincing evidence to prove the innocence of Kim Lee Hubbard relative to the charge of murder in the second degree of which he was convicted on March 1, 1974, recognizing the extraordinarily high standard of proof needed. However, at the same time and without contradiction, gross inconsistencies in evidence presented by the prosecution cast a reasonable doubt on the question of Kim Lee Hubbard's guilt.

We recommend that the Hubbard's aim of clearing the name of their son is best served at present by extralegal means, namely, further investigation. Their legal recourse has been virtually exhausted, and it is our professional opinion that the Hubbard's can currently expect no positive result from a criminal justice system which has served them so poorly in the past. Accordingly, their resources are most usefully directed toward additional investigation.